Chauffeurs, Teamsters and Helpers Local 776, affiliated with International Brotherhood of Teamsters, AFL–CIO[1] ***and*** **Rite Aid Corporation.** Case 5–CB–6292

December 11, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHEN AND MEMBERS OVIATT AND RAUDABAUGH

The General Counsel of the National Labor Relations Board issued a complaint on June 20, 1989, against Chauffeurs, Teamsters and Helpers Local 776, the Respondent, alleging that it has violated Section 8(b)(1)(A), (2), and (3) of the Act by continuing to seek judicial enforcement of an arbitration award that is in direct conflict with the Board's unit clarification determination in Case 5–UC–275 (not included in bound volumes). The Respondent filed its answer admitting the pertinent facts as set forth more fully below, but denying that its conduct has violated the Act.

On December 18, 1989, the General Counsel filed with the Board a Motion for Summary Judgment, with exhibits attached.[2] The General Counsel contends that, in light of the factual admissions contained in the Respondent's answer, the pleadings raise no genuine issues of fact which require an evidentiary hearing. Thereafter, on December 22, 1989, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent filed a response, with brief attached. The Charging Party also filed a response, with brief attached. Finally, the General Counsel filed a supplemental memorandum in support of its Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In light of the Respondent's admission of all factual allegations in the complaint, there is no material issue of fact that would require a hearing. Further, for the reasons set forth below, we find, on the basis of the undisputed record evidence, that the Respondent has violated the Act as alleged. Accordingly, we are granting the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a Pennsylvania corporation, with an office and place of business in Shiremanstown, Pennsylvania, where it operates a regional distribution facility serving retail stores operated by the Employer. During the past 12 months, a representative period, the Employer, in the course and conduct of its business operations purchased and received at its Shiremanstown, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Pennsylvania. We find, on the basis of the foregoing, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction. We further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue is whether the Respondent has violated Section 8(b)(1)(A), (2), and (3) of the Act by continuing to prosecute its Section 301 lawsuit in the face of a conflicting Board unit clarification determination.

A. *Facts*

Prior to August 1987, the Employer operated a Central Distribution Center (CDC) in Shiremanstown, Pennsylvania, and another five CDCs in other States which served as regional distribution/warehouse hubs for retail stores. The Employer's warehouse employees at its Shiremanstown facility have historically been represented by the Respondent since the mid-1960s. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from July 26, 1987, through July 22, 1990. The agreement defines the bargaining unit as follows:

> The bargaining unit covered by this Agreement consists of all warehouse employees, carpenters, and truck drivers, including step-in van drivers, over-the-road drivers, employed by Rack-Rite Distributors Division, Rite Aid Corporation, at its Shiremanstown, Pennsylvania, operation; but excluding salesmen, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all employees at the Employer's other warehouse locations.

[1] The name of the Respondent has been changed to reflect the new official name of the International Union.

[2] We grant the General Counsel's unopposed motions to receive additional evidence in the form of proposed Exh. 26, which is a copy of the judgment order of the United States Court of Appeals for the Third Circuit, in Case No. 89–5859, affirming the judgment of the United States District Court for the Middle District of Pennsylvania in Case No. 89–0015; proposed G.C. Exh. 27, which is a copy of the order of the United States Court of Appeals for the Third Circuit denying the Respondent's sur petition for rehearing; and proposed G.C. Exh. 28, which is a copy of the order of the United States Supreme Court denying the Respondent's petition for a writ of certiorari.

The current agreement contains a provision for final and binding arbitration of grievances.

In August 1987, substantial retail expansion caused an increased volume of warehouse ''returns work'' of damaged or unsold goods. The Employer, therefore, instituted certain changes in its returns processing and established a Central Returns Warehouse (CRW) in Shiremanstown as a nonunion facility. Thereafter, all ''returns,'' after preliminary sorting and separation at the respective CDCs, were shipped to the Shiremanstown CRW, where the final two stages of the returns process would be performed. Twenty seven new employees were hired to work in this new facility. No employees were transferred from the existing CDC to CRW. Employees in the CDC who had been performing the now-removed returns work were transferred to other positions within the CDC.

The Respondent filed three grievances protesting the Employer's actions and seeking a finding that the returns work performed at the CRW be declared bargaining unit work covered by the collective-bargaining agreement and that the Employer be directed to make whole all affected employees. On July 14, 1988, the arbitrator issued an award concluding that ''the Company violated Article II of the Agreement [Union Recognition Clause] by its failure to have applied the terms of the Agreement to the performance of returns work . . . by its Central Returns Warehouse component.''

Thereafter, on August 18, 1988, the Employer filed a unit clarification petition with the Board in Case 5–UC–275 seeking to exclude from the CDC unit those employees hired and employed in the CRW. While the Employer's petition was pending, the Respondent, on January 5, 1989, filed a Section 301 complaint in the United States District Court for the Middle District of Pennsylvania, seeking enforcement of the arbitrator's award. On February 7, 1989, the Board's Regional Director for Region 5 issued a Decision and Order in Case 5–UC–275, which clarified the Shiremanstown CDC unit to exclude the employees in the CRW. The Regional Director concluded that the CRW facility is basically a different operation from the CDC facility. He viewed the Employer's petition as raising ''the same fundamental issue that was the subject of the Arbitrator's decision'' but refused ''to defer to the Arbitrator's Decision and Award in regard to the representational status of the employees subject to the petition.'' The Respondent filed a request for review which was denied on April 28, 1989, by the Board. A further motion for reconsideration and a request for leave to file an appeal by the Respondent were also denied. The Respondent nevertheless continued to press its Section 301 suit in the district court.

On May 12, 1989, the Employer filed a charge leading to the instant complaint, which issued on June 20, 1989. On September 29, 1989, the district court granted the Employer's Motion for Summary Judgment dismissing the Respondent's Section 301 suit. On October 25, 1989, the Union filed an appeal with the United States Court of Appeals for the Third Circuit. On December 18, 1989, the General Counsel filed the instant Motion for Summary Judgment. While the motion was pending, the court of appeals affirmed the district court's decision. The Respondent subsequently petitioned for rehearing in the court of appeals and to the United States Supreme Court for a writ of certiorari. Both petitions were denied.

B. *Contention of the Parties*

The General Counsel, in support of his Motion for Summary Judgment, contends that the issue presented is representational rather than contractual[3] and that the Board has an express statutory mandate to determine questions of representation, accretion, and appropriate unit. Moreover, it is well settled that Board decisions override conflicting arbitral awards. *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964). Further, according to the General Counsel, once an arbitral award has issued involving questions of representation, accretion, and appropriate unit, the Board applies the standards enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), to determine if the decision merits deference. If the decision does not warrant deference, the Board will find a violation based on an attempt to enforce the arbitral award. *Port Chester Nursing Home*, 269 NLRB 150 (1984). The General Counsel further contends that deference to the arbitrator's award is totally unwarranted here, as the award is in direct conflict with the Board's unit clarification decision. According to the General Counsel, under *Carey v. Westinghouse*, supra, the Board's unit clarification decision takes precedence over the conflicting arbitral award, and the award is unenforceable through a Section 301 lawsuit. Therefore, the General Counsel maintains that the Union's attempt to enforce that award in the face of the Board's unit clarification decision must be considered an unfair labor practice since the objective of the Respondent's lawsuit is illegal under Federal law. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

The General Counsel further maintains that the Respondent violated Section 8(b)(3) of the Act by seeking to enforce an arbitration award which requires the Employer to apply the parties' collective-bargaining agreement, including the union-security provision, to nonbargaining unit employees. *Retail Clerks Local 588 (Raley's)*, 224 NLRB 1638 (1976), enf. denied 565

[3] The Charging Party, Rite Aid, in response to the Board's Notice to Show Cause, submitted a letter noting its agreement with the General Counsel that this matter is representational rather than contractual.

F.2d 769 (D.C. Cir. 1977); *Electrical Workers IBEW Local 323 (Active Enterprises)*, 242 NLRB 305 (1979). Further, the General Counsel argues that in these circumstances, the Respondent's conduct must also be considered an attempt to cause the Employer to discriminate in violation of Section 8(a)(3) against the employees to whom the Respondent seeks to have the contract extended and applied. The General Counsel contends that the conduct thus violates Section 8(b)(1)(A) and (2) as well. Id.

In its answer to the General Counsel's motion, the Respondent admits the factual allegations of the complaint, but denies that summary judgment in favor of the General Counsel is appropriate. Specifically, it argues that the central issue is contractual rather than representational, and that because the Employer failed to move to vacate the arbitrator's award resolving the contractual dispute in the Respondent's favor, that award should be regarded as final and binding against the Employer. Because that award held that the CRW work was bargaining unit work, the Respondent therefore contends that the Board should hold the Employer estopped from invoking the Board's unit clarification procedure in an effort to circumvent the award by having the CRW employees declared to be outside the unit. The Respondent further denies that its efforts to enforce its view of the contract through the suit to enforce the award constitute an unfair labor practice. Finally, the Respondent argues that ruling on the General Counsel's motion is premature because, although the district court had refused to enforce the arbitration award, the Respondent had appealed that adverse ruling to the court of appeals and could seek certiorari of any adverse ruling by the appellate court.[4]

C. *Discussion*

We agree with the General Counsel that the underlying question is representational rather than contractual. The Respondent's characterization of the dispute as contractual does not create a factual dispute.

After issuance of the unit clarification determination which found that the newly hired CRW employees were excluded from the CDC unit employees, the Respondent continued to maintain its Section 301 suit to enforce the arbitrator's conflicting award. Based on this conduct in derogation of the Regional Director's unit clarification determination, the General Counsel issued the instant complaint. We hold that the arbitrator's decision is not controlling because it was superseded by the superior authority of the Board's subsequent unit clarification Decision and Order. *Carey v. Westinghouse*, supra. By continuing to seek enforcement of an arbitration award which is in direct conflict with the Board's unit clarification determination, the Respondent has, in effect, sought to apply the collective-bargaining agreement to employees whom the Board has already determined to be outside of the parties' bargaining unit. In so doing, the Respondent has insisted and is insisting on bargaining for a change in the scope of the existing bargaining unit and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.[5]

Further, by insisting on application of its entire contract, including the union-security provisions, to the Employer's CRW employees, the Respondent has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act. By that same conduct, it has attempted to cause the Employer to discriminate against the CRW employees in violation of Section 8(a)(3) of the Act and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.[6]

Although the legality of a lawsuit is in issue, the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, supra, does not require a contrary method of analysis. In that case, the Supreme Court held, with exceptions noted below, that, as a general rule, a lawsuit could be condemned as an unfair labor practice if two conditions were met: (1) the suit had a retaliatory motive, i.e., it was motivated by a desire to retaliate against the exercise of a Section 7 right; and (2) the lawsuit lacked a reasonable basis in fact or law.

The Court further noted, however, that it was not addressing a case in which (1) the lawsuit was preempted by the Act or (2) the lawsuit had an objective which is illegal under Federal law. In either of these situations, the legality of the lawsuit enjoys no special protection under *Bill Johnson's*.

The instant case involves the ''illegal objective'' exception. As an initial matter, we note that ''illegal objective'' does not mean the same thing as ''retaliatory motive.'' As noted above, the holding of *Bill Johnson's* is that a lawsuit can be condemned as an unfair labor practice if it is filed with a retaliatory motive and if it has no reasonable basis. The ''retaliatory motive'' refers to actual motive of the respondent-plaintiff in filing the suit. If the actual motive of the lawsuit is to retaliate against or frustrate the exercise of a statutory right, that component of the general rule has been met.

[4] As noted in fn. 2, above, the court of appeals has since affirmed the district court's ruling against the Respondent, and the Supreme Court has denied a petition for certiorari.

[5] *Chicago Truck Drivers (Signal Delivery)*, 279 NLRB 904 (1986); *Retail Clerks Local 588 (Raley's)*, supra; *Electrical Workers IBEW Local 323 (Active Enterprises)*, supra; and *Smith Steel Workers v. A. O. Smith Corp*., 420 F.2d 1 (7th Cir. 1969). In *Smith Steel Workers*, the court held that a union failed to bargain in good faith when it continued to insist that it represented certain workers and sought arbitration of the issue after a Board decision that the workers were part of a unit represented by another union. The court reasoned that following the Board's unit clarification order, the union had no right to employ grievance procedures to overturn it.

[6] *Retail Clerks Local 588 (Raley's)*, supra.

As a separate matter, the Court said in footnote 5 that it was not dealing with a suit that had an ''illegal objective'' (or that was preempted). Accordingly, it is clear that the Court intended the phrase ''illegal objective'' to mean something other than ''retaliatory motive.''

Having said what ''illegal objective'' does not mean, we now turn to what it does mean. In our view, where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the ''illegal objective'' exception to *Bill Johnson's*.[7] Accordingly, the lawsuit enjoys no special protection. If it is unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice.

Applying these principles to the instant case, we note that the Regional Director, on February 7, 1989, ruled that the CRW employees were not included in the CDC unit. Despite this ruling, and the Board's subsequent denial of a request for review, the Respondent continued to press its lawsuit. That lawsuit was aimed at achieving a result that is incompatible with the Regional Director's ruling. Accordingly, the lawsuit was for an ''illegal objective'' within the meaning of footnote 5 of *Bill Johnson's*.[8] In view of this, and because the lawsuit violates Section 8(b)(1)(A), (2), and (3) under established NLRA principles, the lawsuit can be condemned as an unfair labor practice under these subsections from and after February 7, 1989.[9]

CONCLUSIONS OF LAW

1. By continuing to seek enforcement of an arbitration award which is incompatible with the Board's unit clarification decision in Case 5–UC–275, thus seeking to apply its collective-bargaining agreement to employees whom the Board has already determined to be outside the bargaining unit, the Respondent has insisted and is insisting on bargaining for a change in the scope of the existing bargaining unit and therefore has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(b)(3) of the Act.

2. By insisting on application of its entire contract, including the union-security provision, to the Employer's CRW employees, the Respondent restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act and has attempted to cause the Employer to discriminate against its employees and has thereby engaged in and is engaging in an unfair labor practice in violation of Section 8(b)(2) and (1)(A) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A), (2), and (3) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Employer for all reasonable expenses and legal fees, with interest, that the Employer incurred after February 7, 1989—the date of issuance of the Board's unit clarification order—in defending against the Section 301 suit in the United States District Court for the Middle District of Pennsylvania, and any subsequent appeals Respondent has filed or may file.[10] Those expenses were incurred solely because the Respondent continued to maintain its suit after the Regional Director issued his unit clarification determination in Case 5–UC–275, an action that we have found violated the National Labor Relations Act. In order to vindicate our interest in enforcing the Act, we have the statutory au-

[7] We do not necessarily imply that this is the only application of the phrase ''illegal objective.'' Another situation, acknowledged by the Supreme Court in *Bill Johnson's*, is where a union, for example, has sought state court enforcement of fines that could not be lawfully imposed under the Act. 461 U.S. at 737 fn. 5.

[8] In view of the conclusion that the lawsuit falls within the ''illegal objective'' exception to *Bill Johnson's*, we need not pass on whether the suit had a retaliatory motive and whether it had no reasonable basis in fact or law.

[9] *Teamsters Local 952 (Pepsi-Cola Bottling)*, 305 NLRB No. 28 (Sept. 30, 1991). Because the unfair labor practice complaint attacks the lawsuit only from and after February 7, 1989, we need not decide whether it would be appropriate to find that filing and maintenance of the lawsuit prior to that point constituted an unfair labor practice.

[10] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In prior cases in which the Board has ordered reimbursement for litigation fees and other expenses, the parties apparently did not litigate, and thus the Board did not specifically address, the issue of interest on litigation expenses. See, e.g., *Phoenix Newspapers*, 294 NLRB 47 (1989) (former Member Cracraft dissenting on the merits) (litigation expenses awarded without interests); *Bill Johnson's Restaurants*, 290 NLRB 29, 32–33 (1988) (Chairman Stephens dissenting in part on the merits) (litigation expenses awarded without interest); and *Baptist Memorial Hospital*, 229 NLRB 45 (1977) (litigation expenses awarded without interest), but cf. *Inland Boatmen's Union (Dillingham Tug)*, 276 NLRB 1261 (1985) (interest awarded on litigation expenses). See *J. P. Stevens & Co.*, 244 NLRB 407, 408, 409 (1979) (interest awarded on litigation expenses in light of respondent's flagrant disregard of Board and court orders). In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court stated, at 747:

> If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses. *It may also order any other proper relief that would effectuate the policies of the Act*. 29 U.S.C. § 160(c). [Emphasis added.] [Footnote omitted.]

On consideration, we hold that in make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses. The remedial order is designed to restore the status quo ante and to make whole the party who had to defend against an unlawful legal action. A party will normally incur those expenses at the time it is defending against an unlawful action. A subsequent make-whole award, like an award of backpay, must include interest because such an award is a form of indebtedness. See *Isis Plumbing Co.*, 138 NLRB 716, 719 (1962).

thority pursuant to Section 10(c) to authorize such relief.

ORDER

The National Labor Relations Board orders that the Respondent, Chauffeurs, Teamsters and Helpers Local 776, affiliated with International Brotherhood of Teamsters, AFL–CIO, Harrisburg, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining its Section 301 lawsuit seeking enforcement of Arbitrator Ira Jaffe's Opinion and Award concerning grievance numbers 6204, 7590, and 9834.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw or if necessary otherwise seek dismissal of any action in *Teamsters Local 776 v. Rite Aid Corp*., C.A. No. CV–89–5859.

(b) In the manner set forth in the remedy portion of the decision, reimburse the Employer, Rite Aid Corporation, for all reasonable expenses and legal fees, with interest as computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), incurred in defense of the Section 301 lawsuit styled as *Teamsters Local 776 v. Rite Aid Corp*., in Case No. 89–5859 in the United States Court of Appeals for the Third Circuit, in *Teamsters Local 776 v. Rite Aid Corp*., in Case No. CV–89–0015 of the United States District Court for the Middle District of Pennsylvania, and any subsequent actions the Respondent has filed.

(c) Post at its offices and meeting halls copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by its authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by it to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward signed copies of the notice to the Regional Director for Region 5 for posting by Rite Aid Corporation, if willing, at its facilities in Shiremanstown, Pennsylvania, where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT continue to maintain our Section 301 lawsuit against the Rite Aid Corporation seeking enforcement of an arbitration award which is in direct conflict with the Regional Director's unit clarification determination in Case 5–UC–275.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw or if necessary otherwise seek dismissal of the lawsuit we filed in *Teamsters Local 776 v. Rite Aid Corp*., C.A. No. CV–89–0015.

WE WILL reimburse the Rite Aid Corporation for all reasonable fees and legal expenses, plus interest, incurred in defense of the Section 301 lawsuit styled as *Teamsters Local 776 v. Rite Aid Corp*., C.A. No. 89–5859 in the United States Court of Appeals for the Third Circuit and C.A. No. CV–89–0015, in the United States District Court for the Middle District of Pennsylvania, and any subsequent actions we have filed.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL 776, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''